

University System
of New Hampshire



Advisors Training

University System
of New Hampshire



Welcome

Title IX Training Series

Granite State College Keene Plymouth State University of
STATE COLLEGE STATE COLLEGE UNIVERSITY New Hampshire

University System
of New Hampshire



Training Overview

➤ Thanks!

➤ Goal:

- Hearings regarding matters of Sexual Violence, Sexual Harassment and Related Offenses, including matters falling within the scope of 2020 Federal Title IX Regulations
- Definition of sexual harassment
- Scope of the university's educational program or activity
- The adjudication process (may differ for employee matters)
- How to conduct cross-examination.
- Relevancy determinations at live hearings.
- Written determination regarding responsibility.
- Appeal



Acknowledgement

- ▶ Examples in this training use references to explicit sexual behavior or body parts
- ▶ These references are a common occurrence in this work
- ▶ Such references must not easily offend. Please discuss concerns with Title IX Coordinator or Conduct Director



Title IX Overview

Title IX Definitions

▶ Title IX

▶ Sexual Harassment is defined by Title IX as:

- ▶ An employee or graduate student in an employment role conditioning the provision of an aid, benefit, or service of the university on an individual's participation in unwelcome sexual conduct (commonly known as *quid pro quo* sexual harassment); OR
- ▶ Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the university's education program or activity; OR
- ▶ Sexual assault as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA.

▶ "Institutional Policy" – USNH institutions continue to hold community members responsible for their behavior toward fellow community members through the student code of conduct and/or discriminatory harassment policy:

- ▶ Severe "or" pervasive sexual harassment.
- ▶ Sexual assault, unwanted sexual contact, relationship abuse (domestic violence), stalking

▶ Same investigative and adjudication process is used for **both** "Title IX" and institutional policy for cases alleging violation by a student. Process may differ for cases alleging violation by an employee.

Mandatory Dismissal of a Formal Complaint Under Title IX

- ▶ The university must review the Formal Complaint to determine if it constitutes sexual harassment as defined by Title IX. If it does not fit the definitions of sexual harassment under Title IX, even if proven true, the university must dismiss the Formal Complaint
- ▶ Nonetheless, the university can pursue the complaint otherwise under its code of conduct. If a mandatory dismissal occurs, your advisee will receive a letter letting them know the university has dismissed the Title IX Formal Complaint but will investigate and adjudicate the matter pursuant to the SRRR or the Discrimination & Discriminatory Harassment Policy
- ▶ The complainant or respondent can appeal a dismissal of a Title IX Formal Complaint



Scope of the University's Education Program or Activity

- ▶ It is a fact specific inquiry. The key questions are whether the institution exercised “substantial control over the respondent and the context in which the incident occurred”
- ▶ There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection
- ▶ For example, Title IX applies to sexual harassment that occurred in an off-campus building owned or controlled by a student organization that the university has officially recognized, such as Greek housing
- ▶ However, USNH Policy makes clear the university will pursue misconduct that meets a broader definition of sexual harassment or occurs outside of its program or activity

Title IX Process Requirements

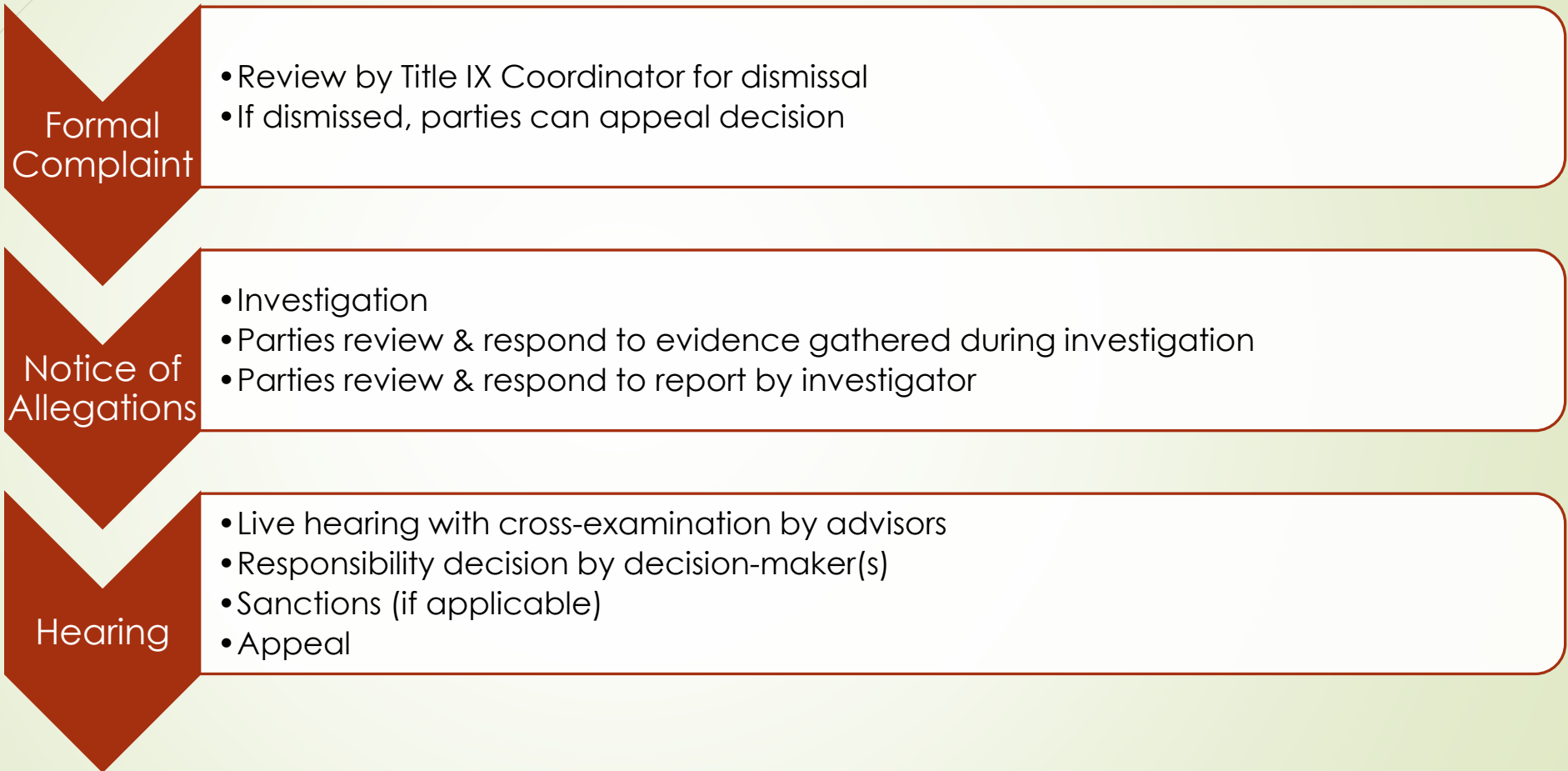
- ▶ “Formal Complaint” by complainant or Title IX Coordinator
 - ▶ Title IX Coordinator reviews and must dismiss if it does not meet the Federal definitions but UNH can still address the matter under institutional policies
 - ▶ Parties can appeal the dismissal decision
- ▶ Investigation by institution
- ▶ Parties review evidence and investigation report
- ▶ Institution presents case
- ▶ Live hearing with cross-examination is required
- ▶ Responsibility determination and sanctions (if applicable)
- ▶ Appeal
- ▶ Supportive measures are offered to the parties throughout the adjudication process


- ▶ *Note: sexual identity, gender or gender identity are legally neutral in Title IX: any person may commit or be impacted by sexual violence*

Advisor of Choice

- ▶ Both parties may have an advisor of their choice who can be an attorney
- ▶ Institution must appoint an advisor if a party does not have one
- ▶ The advisor may accompany a party to interviews and hearings
- ▶ The advisor may also inspect evidence and review the investigative report
- ▶ The advisor must cross-examine parties and witnesses, but only the advisor is permitted to do so
 - ▶ Relevant questions
 - ▶ Follow-up questions
 - ▶ Including challenges to credibility
- ▶ The advisor must follow the rules of decorum

Phases of the Process





Equity

- Principal Goal of Title IX & Institutional Policy
 - Complainant has a right to fair process, free from bias
 - Respondent has a right to fair process, free from bias
 - Generally, supports and procedural adjustments for one party are offered to the other party
- Respondent is presumed not responsible throughout investigation
- Investigative and hearing process designed to protect the fairness and integrity of the decision on responsibility

A Word on Confidentiality

- ▶ Student conduct is part of educational record
- ▶ Employee personnel matters are generally confidential
- ▶ Breach of confidentiality can be a form of retaliation
- ▶ Witnesses, investigators, staff and decision-makers are required to maintain the privacy and confidentiality of the proceedings
- ▶ However, parties have the right to discuss the incidents or the allegations
 - ▶ They may be cautioned to avoid litigating the case through gossip, innuendo (retaliation)
 - ▶ They may be cautioned about retaliation, libel, and slander



A Word on Retaliation

- ▶ Act of punishment, revenge or recrimination
- ▶ Every party, every witness in a Title IX or related investigation has a legal right to be free from retaliation
- ▶ Title IX expressly prohibits retaliation against any individual exercising rights under Title IX, specifically protecting any individual's right to participate or refuse to participate in a Title IX grievance process
- ▶ Investigators can caution all parties and witnesses prior to their interview about the prohibition on retaliation
- ▶ UNH does not tolerate retaliation of any kind, whether or not the complaint is ultimately judged to be sexual violence or sexual harassment



Role of Advisors



Campus Supports for your Student-Advisee

- ▶ Counseling services
 - ▶ <https://www.unh.edu/pacs/>
- ▶ Wellness services
 - ▶ <https://www.unh.edu/health/>
- ▶ Accessibility services
 - ▶ <https://www.unh.edu/studentaccessibility>
- ▶ Title IX Coordinator
- ▶ Conduct Director
- ▶ Dean of Students
- ▶ Academic dean(s)
- ▶ Academic advisors

Supports for your Employee-Advisee

- Employee Assistance Program (EAP)
 - <https://www.unh.edu/hr/employee-assistance-program>
- Human Resources Partners
 - <https://www.unh.edu/hr/partners>

Role of Advisor

- ▶ Become familiar with policies applicable to the matter you are advising
 - ▶ Contact staff if you need help accessing the policy documents
- ▶ Explain the processes to advisee
 - ▶ Expect your advisee to ask the same question more than once
 - ▶ Importance of relevance to admissibility of information
 - ▶ Importance of cross-examination to findings of fact
- ▶ Help advisee make choices about
 - ▶ How best to participate and engage in the adjudication process
 - ▶ Providing statements or asserting right to silence
 - ▶ Accompany advisee to meetings or interviews
 - ▶ Supports and adjustments to request
- ▶ Review evidence gathered by the investigator
- ▶ Review investigative report and help advisee respond to it if desired



Relevance




Relevance

- ▶ Dictionary: closely connected or appropriate to what is being done or considered
- ▶ Legal: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- ▶ The evidence is pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true
- ▶ Merriam-Webster Dictionary defines “relevant” as “affording evidence tending to prove or disprove the matter at issue or under discussion.”



Basic Relevance

- ▶ Dangers of irrelevant information
 - ▶ Waste time, prejudice & faulty findings
 - ▶ Irrelevant evidence may rob a party of their right to fair decision
- ▶ Focus on the incident(s) itself
 - ▶ Information connected with the incident probably is relevant
 - ▶ Information that is not directly connected to the incident is more likely not to be relevant
 - ▶ Exceptions: course of conduct, demographic information (introductions), threat



Relevant Evidence v. Directly Related Evidence

- The investigator is charged with gathering evidence “directly related to the allegations” raised in the Formal Complaint
- Directly related evidence is more broad than “relevant” evidence
- The investigator may gather evidence that is directly related to the matter at issue, but ultimately decide that it is not relevant to include in the investigative report

Relevant Evidence v. Directly Related Evidence (continued)

- ▶ However, parties and their advisors must have the opportunity to review evidence gathered that is directly related as well as relevant evidence included in the investigative report
- ▶ Parties can argue to the decision-maker that evidence directly related to the allegations is in fact relevant
- ▶ This includes evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility

Relevance Continued

- ▶ Decision-makers determine whether questions and evidence are relevant
 - ▶ Made by applying logic and common sense, but not against a backdrop of legal expertise.
 - ▶ Probative – demonstrates a fact at issue, but does **not** necessarily resolve the issue
 - ▶ Material fact – necessary to decide an issue in the case
 - ▶ If not relevant, the decision-maker will not allow the question or will not use the information in making a decision on responsibility
 - ▶ Evidence being used for the purpose of suggesting that a person acted on the occasion in question consistently with their poor character in unrelated circumstances raises questions of relevancy or the weight given to such evidence



Rape Shield Principles

- ▶ Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ Exceptions:
 - ▶ Evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - ▶ Specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Character

- ▶ For example, in “standard” adjudications we generally exclude information about a student’s good or bad character
- ▶ In sexual misconduct adjudications character evidence is admissible only if it is **relevant**
 - ▶ The party offering character evidence can be asked to explain how the character evidence that is being offered is relevant
 - ▶ The closer the connection to the incident at issue, the more likely it is admissible
- ▶ “Badgering,” or abusive, intimidating and/or disrespectful questioning of witnesses is not permitted to get them to admit to bad character
- ▶ Cumulative information about good/bad character may be excluded



Prejudicial Information

- For example, in “standard” adjudications unfairly prejudicial information is generally excluded
- In sexual misconduct adjudications, prejudicial information is admitted only if it is **relevant**
- “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted
- Cumulative information regarding prejudicial information may be excluded

Prior Bad Acts

- For example, in “standard” adjudications, evidence of a person’s previous misconduct is not generally admitted
- In sexual misconduct cases, evidence of prior bad acts is admitted only if it is **relevant**
- “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted, including to get them to admit to prior bad acts
- Cumulative information about prior bad acts may be excluded



Consent

University's Definition of Consent

- Agreement to sexual interaction is essential
- “Expressed consent”
 - Verbal, or
 - By conduct
- Consent can be revoked at any time
- Consent may not be:
 - Coerced by threat, violence or manipulation
 - Given by a person who is incapacitated
- Institutional policies (SRRR & others) define consent, incapacity and related terms

Common Issues with Consent

- ▶ Consent by conduct
 - ▶ Physical passivity is not consent, but expressed consent does not require verbal consent at any stage of a sexual interaction
 - ▶ Would a reasonable sexual partner understand that consent was given?
- ▶ Revocation of consent – how clearly must a person communicate that their mind/intention has changed?
 - ▶ It must be communicated, but it does not have to be communicated verbally
 - ▶ Would a reasonable sexual partner understand that consent was revoked?
- ▶ Incapacity
 - ▶ Intoxication is not incapacity
 - ▶ Physical manifestations of incapacity in presence of partner: slurred speech, loss of motor control, falling asleep during sexual interaction, incoherent speech, vomiting
 - ▶ Would a reasonable partner understand that the other was incapacitated?



Trauma Informed



Impact of Trauma

- ▶ There is a body of scientific research that suggest that physical and emotional trauma can interfere with the formation of memory
 - ▶ Trauma during an event may help explain gaps in a person's memory of the event
 - ▶ This research has influenced training of investigators and hearing panel members
- ▶ There also is a scientific and policy critique of the “trauma informed” approach
 - ▶ There are other causes of gaps in memory
 - ▶ Risk of gender bias
 - ▶ Risk of assuming that gaps in memory are themselves evidence of trauma
 - ▶ In the context of campus sexual assault, violent sexual assault is rare, but disputes about whether consent was expressed are very common



What we can learn from “trauma informed” principles

- People do not necessarily form stronger memories during a stressful event, in fact
- People often do not remember events in precise, detailed chronological order
- Start by asking witnesses what they do remember about an event, don't interrupt as they relate their memories, and allow them to report what they do remember
- Gaps in memory are not proof that someone is lying – or that they are telling the truth



Our recommendations regarding trauma informed techniques

- ▶ Use the “trauma informed” questioning techniques with all witnesses, regardless of their gender or role in the case
- ▶ Treat all witnesses with respect, regardless of their gender or their role in the case
- ▶ Be as fair as humanly possible to everyone in the process
- ▶ Don’t substitute any assumption about what gaps in memory mean for a careful, thoughtful, fair assessment of the facts



Live Hearing

Live Hearings Can Be Held Virtually

- ▶ **Tips for Online Hearings**
- ▶ **For employees working virtually, please be sure to review and follow UNH IT security standards:** <https://www.unh.edu/hr/it-security-standards-teleworking>
- > **Log On Early:** Sign into the hearing a little early to make sure you can connect without issues!
- > **Internet Stability:** We can't control the internet...if yours goes out, simply reconnect to the hearing as quickly as you can. We will pause the hearing if anyone leaves unannounced.
- > **Share Your Screen:** If you want to reference a photo or document, or even draw a diagram, just ask to share your screen.
- > **Breakout Rooms:** We will use breakout rooms often in online hearings. We jump around from room to room coordinating things...so hang tight...we haven't forgotten about you.
- > **Viewing Documents:** We've heard that it's been useful to have a second screen or device to look at hearing documents on. This way you aren't trying to do everything on one screen.
- > Let the Title IX Coordinator or Conduct Director know if you are unfamiliar with Zoom or need equipment for the hearing.

Order of Live Hearing

- Opening Instructions
 - Rules of Decorum
 - Order of Events for the Day
- Submitting report into evidence
- Opening statements
- Questions by decision-maker(s)
- Cross-Examination by the advisors
- Closing statements and instructions/guidance



Rules of Decorum

- In essence: rules for good meetings
 - Fairness
 - Politeness
 - Mutual respect
- Apply to everyone: parties, advisors, decision-makers

Topics Included (partial list)

Required

- Preparation
- Promptness
- Cell phones silenced
- Listening
- Speaking in turn
- Focus on relevant topics
- Courtesy, respect
- Maintain confidentiality

Prohibited

- Outbursts
- Profanity
- Threatening
- Disorderly behavior
- Disruptive conversations/
interruptions
- Disobeying rules of decorum

Obligation to Cross-Examine

- ▶ Important for you to know what your advisee wants to communicate to the decision-maker
- ▶ Cross-examine to
 - ▶ Test a witness' memory
 - ▶ Test a witness' truthfulness, bias
 - ▶ Follow-up and make sure that important details are included in the hearing record
 - ▶ Assure that witnesses acknowledge facts that are damaging to their narrative but helpful to your advisee's narrative
- ▶ You will be asked to submit cross-examination questions in advance of the live hearing in order to expedite relevancy determinations, but it is not mandatory to do so

Cross-Examination by Advisor

- ▶ Must be conducted by the advisor directly, orally, and in real time at the live hearing, which can be held virtually on a case-by-case basis.
- ▶ Relevancy of question is determined by the decision-maker(s)
 - ▶ Party or witness should be instructed not to answer until decision is made
- ▶ If relevant, party or witness may respond
 - ▶ If party or witness refuses to respond, explain repercussions
- ▶ Process:
 - ▶ Advisor states question
 - ▶ Advisor and decision-maker(s) listen, look at decision-maker(s) for nod or other signal and listen for other party's advisor to object
- ▶ Signal to proceed
 - ▶ "Go ahead," or "you may answer"
 - ▶ Visual cue Ok if it is clear on recording

How to Object to Questions

- ▶ [Objector] “that is not relevant”
- ▶ [Decision-maker] “how does that relate to this incident?”
 - ▶ Decision-maker or the other advisor may offer a short statement about relevance
- ▶ Decision-maker states the ruling:
 - ▶ If question is determined to be irrelevant, a brief explanation must be provided to the parties at the hearing.
 - ▶ E.g., “That is not relevant because the complainant’s previous sexual experiences do not relate to this incident.”
- ▶ Parties and advisors can challenge the relevance determination by the decision-maker, but only one time after receiving the explanation



This is not your parents' *Boston Legal* cross-examination of witnesses

- ▶ Not cross-examination in the sense that criminal defense lawyers, prosecutors and civil litigators practice it
- ▶ Subject to Rules of Decorum
 - ▶ Parties/witnesses may be college students
 - ▶ Treat everyone with respect ~~even~~ especially if you disagree with them
- ▶ Sarcasm, invective, intimidation:
 - ▶ First offense: correction by presiding officer
 - ▶ Second offense: may be excluded from hearing



Suggestions for asking difficult questions

- ▶ Details regarding consent or sexual encounters often are important to the conduct charge
- ▶ Let the witness get all the way through their account before
- ▶ Listen carefully, try not to get distracted by questions you plan to ask
- ▶ Who, what, where, when, & how
- ▶ Rarely why?
- ▶ “Help me to understand . . .”
- ▶ “I’m sorry to have to pry into intimate details, but it is important for us to know . . .”
- ▶ “It seems that you are having difficulty recalling some details, but please tell me, if you can what happened”

Reluctant Parties and Witnesses

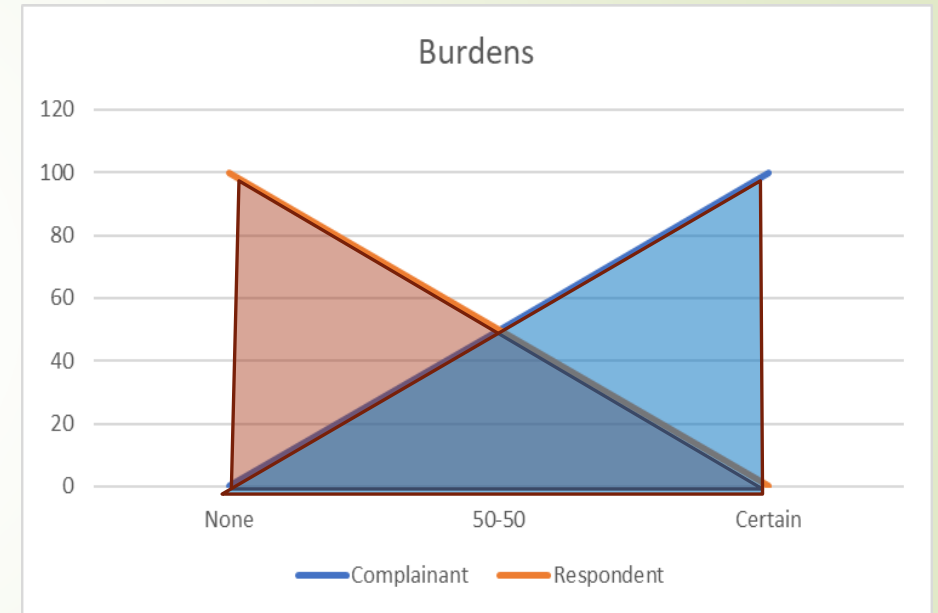
- ▶ Institution cannot compel the parties or any witnesses
 - ▶ Courts can – and do compel parties and witnesses
- ▶ Often a case cannot go to hearing without the complainant
- ▶ Respondent has Fifth Amendment and conduct process right to silence



Burden of Proof

Burden of proof

- ▶ Respondent presumed not to be responsible for the violation until it is proven
- ▶ Institution has to prove the matter “by a preponderance” of the evidence
 - ▶ More likely than not
 - ▶ “50% and a feather”
- ▶ Not required to prove to certainty



Burden of Proof

- ▶ To make a finding of responsibility, decide which evidence was more convincing
 - ▶ If University presented more persuasive evidence on the elements of the charge(s), then the respondent should be found responsible
 - ▶ If not, or if the evidence is equally balanced, the respondent should be found NOT responsible
 - ▶ Consider each “element” of each violation
- ▶ Simply means “more likely than not” – you may have doubts, but believe that it is more likely than not that the incident occurred
- ▶ Greater weight of the evidence
 - ▶ Quality and persuasiveness
 - ▶ Not number of witnesses or documents

[Adapted from Federal Civil Jury Instructions]

Written Determination Regarding Responsibility

- The decision-maker(s) must issue a written determination regarding responsibility by applying the preponderance of the evidence standard of proof
- The written decision must contain all of the following:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the policy to the facts
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent (if applicable), and whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant
 - The institution's procedures and permissible bases for the complainant and respondent to appeal

Appeal

- ▶ An appeal can be based on one or more of the following purposes:
 - ▶ Procedural Error: To determine whether the original hearing was conducted in conformity with the procedures contained in this policy.
 - ▶ Newly Available Evidence: To consider whether there is new evidence, sufficient to alter a decision, provided, however, that the evidence was not reasonably known to the person appealing at the time of the original hearing
 - ▶ Legal error: To determine whether there was bias, conflict of interest or other legal error in the investigative or adjudicative process that a court would likely recognize as requiring a new hearing
- ▶ Additional grounds for appeals may exist for matters handled under the Student Code of Conduct



Thank you!

- ▶ Advisors play a central role in the University System's response to reports of incidents of sexual violence and related misconduct
- ▶ We appreciate your participation in this process